

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION NOS.)	
42B-30011045 AND 42B-30014358 FOR)	ORDER ON SCOPE OF ISSUES FOR
BENEFICIAL WATER USE PERMIT BY)	HEARING
FIDELITY EXPLORATION)	

Pursuant to my order dated October 23, 2006, parties have filed briefs and replies in response to my questions: (1) what is the legal status of water extracted or produced through the exploration and development of coal bed methane; and (2) what specific sections of Mont. Code Ann. apply to each of the applications at issue in this matter. At the outset, I greatly appreciate the parties thorough briefing on the requested issues.

After due consideration of the party's briefs and a review of applicable law, and for the reasons that follow, I conclude that the issues for hearing in this matter shall be limited to:

Application No. 42B-30011045

The criteria of Mont. Code Ann. § 85-2-311(1) shall apply to this application. **The applicant must show by a preponderance of the evidence each of the criteria applicable regardless of any specific objections.**

Application No. 42B-30014358

The criteria of Mont. Code Ann. § 85-2-311(1) and § 85-2-311(4) shall apply to this application. **The applicant must show by clear and convincing evidence each of the criteria applicable regardless of any specific objections.**

I find that each of the applications are independent from the other because different criteria and standards of proof are applicable. In addition, there is no proposal for the *consumption* of 4,000 acre-feet or more of water per year. I therefore reject objectors Northern Plains Resource Council and Tongue River Water Users' Association and Brown Cattle Company (TRWUA) argument that Mont. Code Ann. § 85-2-301(2)(a)(ii) or § 85-2-311(3) are applicable.

TRWUA devotes considerable energy in addressing constitutional questions regarding the status of water produced through CBM development - i.e. is the water proposed to be put to beneficial use "ground water" or something else? Constitutional issues are questions for the courts and not administrative agencies. *Stuart v. Department of Social and Rehabilitation Services*, 247 Mont. 433, 807 P.2d 710. This Hearing Examiner is without jurisdiction to hear those constitutional arguments. **With that in mind and relying on the following, I determine that the hearing in this matter will be conducted by considering the water held in Fidelity's pipeline and storage system as the source of the appropriation.** To rule otherwise would require me to question the constitutionality of the statutory scheme duly established by the Legislature, which I may not do.

That the Legislature intended (but did not expressly state) that water produced by CBM development is to be considered something other than ground water can be inferred by (but not limited to) the following:

1. "Inside the boundaries of a controlled ground water area, ground water may be appropriated only: . . . (b) according to the requirements of an order issued pursuant to 85-2-507." Mont. Code Ann. § 85-2-306(2)(b).
2. The Powder River Controlled Ground Water Area (PRCGWA) was established by Order dated December 15, 1999. In that Order under the heading "Findings of Fact 8" it is stated that "[a]lthough withdrawing groundwater is integral to the coal bed methane extraction method, water is not a desired product of the operation, and must be disposed. Since the withdrawal of the water is not a use of the water per se, a water use permit from the DNRC is not required for withdrawing the water." PRCGWA at p. 2.
3. The PRCGWA order goes on to state under "Conclusions of Law 3" that "[w]ith this designation of a controlled groundwater area the withdrawal of groundwater associated with coal bed methane production will be under the prior jurisdiction of the Montana Board of Oil and Gas."
4. Under the heading "Notices" the PRCGWA order states that "[b]eneficial uses of water produced from CBM operations, such as for stock ponds, wildlife ponds, or irrigation requires a water right issued by DNRC as provided by law."
5. A review of the Applications in this matter reveals that they applied for water produced from within the PRCGWA.
6. Mont. Code Ann. § 85-2-510 provides that "[w]ithin any . . . controlled ground water area or subarea wherein oil and/or gas wells produce either fresh, brackish, or saline water associated with oil and gas, the volume of production of which is dependent entirely on the oil and/or gas withdrawals, such production of water shall be under the prior jurisdiction of the board of oil and gas conservation."

7. Mont. Code Ann. § 82-11-175(2) provides that “[g]round water produced in association with a coal bed methane well must be managed in any of the following ways: (a) used as irrigation or stock water or for other beneficial uses in compliance with Title 85, chapter 2, part 3; (b) reinjected to an acceptable subsurface strata or aquifer pursuant to applicable law; (c) discharged to the surface or surface waters subject to the permit requirements of Title 75, chapter 5; or (d) managed through other methods allowed by law.”

Considering water developed through CBM development as not being a “ground water” appropriation but as an appropriation from their pipeline is more consistent with the statutory scheme of Mont. Code Ann. § 82-11-175 and is eminently more practical. First, the only reason that Fidelity is before the Department is the requirement that in order to put the produced water to beneficial use, they need to comply with Title 85, chapter 2, part 3. If Fidelity had chosen to continue to dispose of their produced water by other means, they could so chose without invoking the jurisdiction of the Department or addressing the constitutional questions (at least in this forum). Secondly, the water in Fidelity’s pipeline can only appear in that pipeline pursuant to the production of the coal bed methane. When the methane is gone, Fidelity would have no legal right to put water into that pipeline and subsequently distribute it for beneficial use. If Fidelity was granted a water right for *ground water*, then presumably when the methane runs out, Fidelity could still exercise their *ground water* right indefinitely. Such a result, the Legislature most certainly did not contemplate happening.

It is therefore **ORDERED** that the Hearing in this matter will proceed consistent with the above.

Dated this 3rd day of January, 2007.

/Original signed by David A. Vogler/
David A. Vogler
Hearing Examiner
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the ORDER ON SCOPE OF ISSUES FOR HEARING was served upon all parties listed below on this 3rd day of January 2007 by first class United States mail.

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